TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 116.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, AND CHARLES DUNCAN, TRUSTEE, PETITIONERS,

vs.

CHARLES H. GREEN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1905.
CERTIORARI AND RETURN FILED NOVEMBER 3, 1905.

(19,902.)

(19,902.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 116.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, AND CHARLES DUNCAN, TRUSTEE, PETITIONERS,

vs.

CHARLES H. GREEN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the district court of the United States for the northern district of New York	1	1
Findings and decisions of referee refusing to allow the filing of claims *nunc pro tunc*	1	1
Order of referee denying application of J. B. Orcutt Company *et al*	5	3
Certificate of referee for review	6	4
Memorandum—Hazel, J.	7	4
Order allowing proofs of claims to be filed	8	5
Petition for appeal	9	5
Citation	10	6
Request of trustee to appeal and his refusal	11	7
Petition of Charles H. Green for revision	12	8
Order for revision	15	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1906.

a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of INGALLS BROTHERS, Bankrupts; CHARLES H. GREEN ET AL., Appellants.

Transcript of Record.

Appeal from the District Court of the United States for the Northern District of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Sep. 16, 1904. William Parkin, clerk.

1 District Court of the United States, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

I, Edwin A. King, Referee in this matter, upon the petition of J. B. Orcutt Company; Charles Duncan and Charles H. Dauchy Company, for leave to file proofs of claims, &c., which petitions were presented to me April 2, 1904, and upon the evidence taken before me, do find the following

Facts.

1st. That adjudication was had herein December 3, 1902.

2d. That April 1, 1903, J. B. Orcutt Company duly verified a proof of claim against the bankrupts for $893.68, and delivered the same shortly thereafter to Charles Duncan, the trustee.

3d. That on December 19, 1902, Charles Duncan duly verified a proof of claim against the bankrupts for $4,171, setting out an offset of $327.

2 4. That at the first meeting of creditors Charles H. Dauchy Company presented to the Referee a defective proof of claim against said bankrupts for $3,535.67, which was returned by the Referee to the said company for correction.

5th. That prior to January 23, 1903, said Dauchy Company duly verified another proof of claim, in the same amount, prepared by Henry W. Smith, who had volunteered to prepare the same so as to comply with the rules; and on or about March 15, 1903, the said Dauchy Company delivered the same to Charles Duncan, the trustee.

6th. That the said trustee, prior to June 1, 1903, delivered all three of said proofs of claim to Henry W. Smith, the attorney for said trustee, with directions to file the same with the Referee.

7th. That said Henry W. Smith, such attorney, received said

proofs of claim and promised to file them with the Referee, but failed to do so.

8th. That the defective Dauchy Company claim first presented and returned as aforesaid is not now to be found, and nothing appears of record in reference thereto prior to this application.

9th. That the claims filed herein prior to December 3, 1903, aggregate about $10,000, and that the estate is not large enough to pay them in full.

10th. That said Henry W. Smith for a time after said claims were so left him for filing by the trustee upon his own responsibility delayed filing the same with the Referee. That on the occasion when he received them he handed them to a clerk in his office, directing him to put them with the papers in this proceeding. That shortly thereafter he told said clerk to file said proofs of claim with
3 the Referee. That subsequently he asked said clerk if he had filed them, and he said he had not; and he then directed said clerk a second time to file them immediately, and the clerk said he would do so. That this was before the expiration of a year after adjudication. That the Dauchy proof so left with said Smith is lost and cannot now be found. That said Smith has made diligent search for it in his office. That he found the Orcutt and Duncan proofs of claim in a package of papers relating to another bankruptcy proceeding; and that his office was upset for a considerable time during the year by reason of repairs being made thereto. That another proof of claim, for the same amount, was duly verified by the Dauchy Company April 2, 1904; and with the Duncan and Orcutt proofs was presented to the Referee for filing, each said proof being accompanied by a petition, dated and filed April 2, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3, 1903, or for such other or further relief as may be just and proper.

11th. That said Henry W. Smith was not the attorney for any of said claimants, and none of them instructed him to withhold their claims from filing, or knew of any intention on his part of so withholding them, or knew that he had failed to file them until more than a year after said adjudication.

12th. That upon the presentation of these petitions, Charles H. Green, Fullerton-Powell Hard Wood Lumber Company, and others, creditors of said bankrupts, objected to the granting of the relief asked in the said several petitions filed April 2, 1904, upon the ground that the proofs of claim have not been seasonably presented to the Court, and are barred by the provisions of Section 57*n* of the Bankruptcy Act.

4 13th. That the trustee has been requested to object to the granting of the relief asked by the petitioners, and has declined so to do upon the ground that he thinks the proofs of claim are legally entitled to be filed.

And I find as conclusions of law:

First.—That by reason of the expiration of more than one year subsequent to the adjudication herein and prior to the filing of said several petitions and the presentation therewith to the Referee of said

several proofs of claim therein referred to, for the purpose of having said proofs of claim filed, neither of said petitioners is entitled to have his respective claim filed.

Second.—That by reason of the expiration of more than one year subsequent to adjudication herein and prior to the filing of said several petitions and the presentation therewith to the Referee of said several proofs of claim therein referred to, for the purpose of having said proofs of claim filed, neither the Referee nor the Court has any discretionary power to permit either of said proofs of claim to be filed, either *nunc pro tunc* or otherwise.

Third.—That the prayer of each of said respective petitions must be denied.

EDWIN A. KING, *Referee.*

(Endorsed:)—Findings and decision of Referee refusing to allow the filing of claims *nunc pro tunc*.—Filed April 22, 1904, 10 a. m.—Edwin A. King, Referee, &c.

5 At a Term of the District Court of the United States, held in and for the Northern District of New York, at the Chambers of the Referee, Troy, N. Y., on the 22d day of April, 1904.

Present: Hon. Edwin A. King, Referee.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

J. B. Orcutt Company, Charles Dauchy Company and Charles Duncan, having heretofore and on April 2, 1904, presented their respective petitions asking leave to file their proofs of claim with the Referee *nunc pro tunc* as of a date prior to December 3, 1902; and said respective petitions having been so amended as to ask for such other and further relief in the premises as may be proper, and the said petitioners having appeared, J. B. Orcutt Company and Charles Duncan by William W. Morrill, their attorney, and Charles Dauchy Company by Thomas O'Connor, its attorney, on behalf of the prayer of said petitions, and Charles H. Green, a creditor, having appeared by H. D. Bailey, his attorney, and Fullerton-Powell Hard Wood Lumber Company, a creditor, having appeared by Frank H. Deal, its attorney, in opposition to the granting of the prayer of said petitions; and the trustee having appeared by Henry W. Smith, his attorney, and submitted arguments in support of said petitions; and the Court having heard the evidence submitted and made thereon its findings of fact and conclusions of law, now, pursuant thereto,

Ordered, that the prayer of the said petitions for leave to file
6 said proofs of claim *nunc pro tunc*, and for other relief in the premises, be, and each of them is, hereby denied.

EDWIN A. KING, *Referee.*

(Endorsed:)—Order denying applications of J. B. Orcutt Company *et al.*—Filed April 22, 1904, 12 m.—Edwin A. King, Referee, &c.

In the District Court of the United States for the Northern District of New York.

In the Matter of ARTHUR S. INGALLS and HOWARD R. INGALLS, as Individuals and as Copartners of the Firm of Ingalls Brothers, Bankrupts.

In Bankruptcy. No. 1249.

To Hon. John R. Hazel, acting Judge:

I, Edwin A. King, Referee herein, hereby certify for review three questions which have arisen before and been decided by me herein, viz.:

1. Does Section 57*n*, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI. (1), or otherwise, under the circumstances of this case, to permit
7 a proof of claim to be filed with me subsequent to one year after adjudication, *nunc pro tunc*, as of a date within said year.

3. Should the relief asked by the petitioners have been granted?

Annexed hereto are my findings of fact, which comprise a summary of the evidence relating to the questions presented, my conclusions of law thereon, the order made by me thereon, and the petitions for review.

Dated Troy, N. Y., May 2, 1904.

EDWIN A. KING, *Referee.*

(Endorsement on cover:)—Certificate on Review.—Filed June 28, 1904.—W. S. Doolittle, Clerk.

Upon the authority of the decision of Judge Adams *In re* Seff, in the Southern District, a certified copy of the record being filed on this hearing, the claim of petitioning creditors will be filed as of the date when delivered to the trustee. The equities are certainly with the creditor, and if possible his contention should be maintained. Moreover, the decision of Judge Adams seems to place a broad construction upon the requirements of General Orders 20 and 21. General Order 21 prescribes the duty of the trustee as to claims filed with him. This implies the propriety of such a filing. The claim having been thus filed the one year limitation has not expired.

The case is returned to the Referee with instructions to file the claims.

(Endorsed:)—Memo. Hazel, *J.*, endorsed on opinion of Referee.

8 In the District Court of the United States for the Northern District of New York.

In the Matter of WILBUR S. INGALLS and HOWARD S. INGALLS, as Individuals and as Copartners of the Firm of Ingalls Brothers, Bankrupts.

In Bankruptcy. No. 1249.

On reading and filing the petitions of Charles H. Dauchy Company, J. B. Orcutt Company and Charles Duncan, dated April 27, 1904, asking a review of an order made by Edwin A. King, Esq., Referee in Bankruptcy, to whom the above entitled matter was referred, and the question relating to the filing of the proofs of claim of the above named petitioners having been certified to the District Judge for his decision thereon by the said Referee, together with a summary of the evidence relating thereto, and the finding and order of the Referee thereon;

Now, on motion of William W. Morrill and Thomas O'Connor, attorneys for said petitioners, after hearing H. D. Bailey and Frank H. Deal, attorneys for certain creditors, in opposition, and having also been attended by H. W. Smith, Esq., attorney for the trustee, it is

Ordered, that the proofs of claim of said several petitioners be received and filed by the said Referee.

Dated June 27, 1904.

JOHN R. HAZEL, *U. S. J.*

(Endorsed:)—Order.—Filed June 28, 1904.—W. S. Doolittle, Clerk.

9 In the United States District Court Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankrupty. No. 1249.

Charles H. Green, one of the creditors of said bankrupts, conceiving himself aggrieved by the order entered herein June 28, 1904, which reverses the determination made by the Referee herein, in reference to the filing *nunc pro tunc* of certain claims of J. B. Orcutt Company, Charles H. Dauchy Company, and Charles Duncan, does hereby appeal from so much of said order as reverses the determination made by the Referee and as answers the questions certified by the Referee, and from said order as a whole, to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that, in view of the position of the trustee and his refusal to act, as shown by request and

refusal herewith filed, the said Green may be permitted to prosecute such appeal and that the transcript of the record, proceedings and papers upon which said order entered June 28, 1904, was made, including the petitions for review filed by J. B. Orcutt Company, Charles H. Dauchy Company and Charles Duncan, the certificate of the Referee, the findings and determination of the Referee and the order thereon duly authenticated, may be sent to the
10 United States Circuit Court of Appeals for the Second Circuit.

H. D. BAILEY,
Attorney for Charles H. Green, Nos. 1 and 2
Keenan Building, Troy, N. Y.

The foregoing claim of appeal is allowed.
Dated July 2, 1904.

JOHN R. HAZEL,
United States District Judge.

(Endorsed:)—Petition for Appeal.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

THE UNITED STATES OF AMERICA, *ss:*

To J. B. Orcutt Company, Charles H. Dauchy Company and Charles Duncan, Greeting:

Whereas, Charles H. Green has lately appealed to the United States Circuit Court of Appeals for the Second Circuit from the order rendered in the District Court of the United States for the Northern District of New York, entered June 28, 1904, and entered in the Clerk's office of said court, and has filed the security required by law, you are hereby cited to appear before said United States Circuit Court of Appeals for the Second Circuit, at the City of New York, on the 30th day of July, 1904, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, in the Second Circuit Court, this 2d day of July, 1904.

JOHN R. HAZEL,
United States District Judge.

(Endorsed:)—In Bankruptcy, No. 1249.—In the United States District Court.—Northern District of New York.—In the Matter of Ingalls Brothers, Bankrupts.—Citation on Appeal.—H. D.
11 Bailey, Att'y for Charles H. Green, Nos. 1 & 2 Keenan Building, Troy, N. Y.—U. S. District Court, N. D. of N. Y.—Filed July 6, 1904, at — o'clock m.—W. S. Doolittle, Clerk.

In the District Court of the United States, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankrupty. No. 1249.

To Charles Duncan, Trustee.

SIR: I am a creditor of the bankrupts with an allowed claim. I am aggrieved at the decision rendered in this court by Hon. John R. Hazel, Judge, at a term held June 14, 1904, and at the order entered thereon, allowing the filing of claims of J. B. Orcutt Company, Charles Dauchy Company and Charles Duncan, as the result of such order will diminish my dividend by about one-half. I desire that an appeal be taken from and application duly made for revision in matters of law of the said decision of June 14, 1904, and the order entered thereon to and by the Circuit Court of Appeals of the United States for the Second Circuit. I will pay all expenses incident thereto. Will you, as trustee, take such appeal and apply for such revision?

C. H. GREEN, *Creditor,*
By H. D. BAILEY,
His Attorney.

12 To C. H. Green.

SIR: I decline to take the appeal and to apply for a revision as requested by you above.

CHARLES DUNCAN, *Trustee.*

(Endorsed:)—Request of Trustee to appeal and his refusal.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

(Endorsed:)—In the District Court of the United States, Northern District of New York.—In Bankruptcy, No. 1249.—In the Matter of Ingalls Brothers, Bankrupts.—Copy Request of Trustee to appeal and his refusal.—H. D. Bailey, Att'y for C. H. Green, Nos. 1 and 2 Keenan Building, Troy, N. Y.

In the United States District Court, Northern District of New York.

In Bankrupty. No. 1249.

In the Matter of INGALLS BROTHERS, Bankrupts.

Petition for Review.

To the Honorables the Justices of the Circuit Court of Appeals for the Second Circuit of the United States.

To Hon. John R. Hazel, Acting District Judge of the Northern District of New York.

The petition of Charles H. Green, respectfully shows: Your petitioner resides in Troy, N. Y., and is a creditor of said bank-
13 rupts, having a claim, which has been duly allowed herein. Said bankrupts were so adjudicated December 3, 1902. On or about April 1, 1904, J. B. Orcutt Company, Charles H. Dauchy Company and Charles Duncan presented to the Hon. Edwin A. King, Referee in Bankruptcy, to whom this matter had been referred, claims aggregating upwards of $7,000, with petitions for leave to have those claims filed *nunc pro tunc* as of a date prior to December 3, 1903. The total amount of claims allowed herein is about $10,000. The assets are not sufficient to pay in full the allowed claims. As the filing *nunc pro tunc* of the above mentioned claims would reduce your petitioner's dividend by nearly one-half, he, in conjunction with other creditors, opposed the application, and the same was denied by the Referee, who, upon the petition of the claimant, certified three questions to the Judge of the Northern District of New York for review, which questions were as follows:

1. Does Section 57*n*, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI. (1), or otherwise, under the circumstances of this case, to permit a proof of claim to be filed with me subsequent to one year after adjudication *nunc pro tunc* as of a date within said year?

3. Should the relief asked by the petitioners have been granted?

And returned therewith his findings of fact, to which no exceptions were taken. The matter was heard by the District Judge on June 14, 1904, and an order made reversing the decision of the Referee. A copy of that order, entered June 28, 1904, is hereto annexed.

14 Your petitioner avers, upon his information and belief, that said order was erroneous in matter of law, in so far as it reverses the decision of the Referee, and in so far as it permits the filing of the claims above mentioned after the expiration of the one year from adjudication, and erroneous in the answer given to each of the questions certified by the Referee for the reasons particularly set forth in the assignment of errors filed by your petitioner, to which reference is hereby made.

Your petitioner further shows that Charles Duncan is trustee herein; that your petitioner has duly requested him to appeal from said order entered June 28, 1904, and to apply for a revision of the same, which the said trustee has declined to do, as more fully appears from the request and answer thereto hereto annexed; that your petitioner's rights are invaded and his dividend materially decreased by the order complained of.

Wherefore, your petitioner, feeling aggrieved because of said order, asks that the same may be reviewed in matter of law by your Honorable Court, as provided in Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the statutes, rules and practice in such case provided, and that your petitioner may be permitted to prosecute such application for revision.

CHARLES H. GREEN, *Petitioner,*
By H. D. BAILEY, *His Att'y.*

STATE OF NEW YORK, *Rensselaer County, ss:*

I. H. D. Bailey, attorney for the petitioner named above, do make solemn oath, that the statements of fact contained in the foregoing petition are true to the best of my knowledge, information and
15 belief. The reason why this verification is not made by the petitioner is that he is now absent out of the State.

H. D. BAILEY.

Sworn to before me, July 1, 1904.
[L. S.] MICHAEL F. O'CONNOR,
Notary Public, Rensselaer County, N. Y.

(Endorsed:)—Petition for Revision.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

In the Circuit Court of Appeals for the Second Circuit.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

Whereas, application has been made by Charles H. Green for revision in matter of law by this Court of the order made by the District Judge of the United States, Northern District of New York, entered June 28, 1904; and

Whereas, it appears that the case is one wherein revision may properly be asked, as provided in Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the statutes and practice in such case made and provided; and

Whereas, a bond in the sum of $500 has been given by said Green and duly approved; now, on motion of H. D. Bailey, attorney for the petitioner Green, it is ordered that the said Charles H.
16 Green be permitted to prosecute such application for revision in his own name, in default of such action by the trustee

herein, and that the said order of the District Court, entered June 28, 1904, be revised in matter of law by the Circuit Court of Appeals, for the Second Circuit, as provided by Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the rules and practice of the Court.

Given under my hand in the Second Circuit Court this 2d day of July, 1904.

JOHN R. HAZEL,
United States District Judge.

(Endorsed:)—Order for Revision.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

In the United States District Court, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

To the Honorables, Justices of the Circuit Court of Appeals for the Second Circuit of the United States.

To Hon. John R. Hazel, Acting District Judge of the Northern District of New York:

The petition of Fullerton-Powell Hardwood Lumber Company respectfully shows: That your petitioner is a creditor of said bankrupts, having a claim, which has been duly allowed. That
17 said bankrupts were so adjudicated December 3, 1902. That on or about April 1, 1904, J. B. Orcutt Company, Charles H. Green Company and Charles Duncan made application to the Referee herein for leave to file with him claims against said bankrupts amounting to upwards of $7,000 *nunc pro tunc*, as of a date prior to December 3, 1903. That said Referee denied such application. The matter was then taken by review to the District Judge, who, on June 27, 1904, made an order entered June 28, 1904, granting such application and directing the filing of claims.

That your petitioner is aggrieved by said order entered June 28, 1904. That, as it is advised and believes, said order was erroneous in matter of law in the following respects:

1st. In that it reverses the decision of the Referee.

2d. In that it permits the claims to be received and filed, after the expiration of one year from the date of adjudication.

3d. In that it does not answer the first question certified by the Referee, "Yes."

4th. In that it does not answer the second question certified by the Referee, "No."

5th. In that it does not answer the third question certified by the Referee, "No."

That your petitioner is interested, in that if the order entered June 28, 1904, herein be permitted to stand, its dividend herein will be decreased nearly one-half.

Wherefore, your petitioner asks, that the said order entered June 28, 1904, herein may be reviewed in matter of law by your Honorable Court, as provided in Section 24*b* of the Bankruptcy Law of 1898, and the amendments thereto, and the statutes, rules and practice in such case provided.

FULLERTON-POWELL HARDWOOD LUMBER COMPANY, *Petitioner,*
By FRANK H. DEAL, *Its Attorney.*

18 STATE OF NEW YORK, *Rensselaer County, ss:*

I, Frank H. Deal, attorney for the petitioner named above, do make solemn oath, that the statements contained in the foregoing petition are true to the best of my knowledge, information and belief. The reason why this verification is not made by the petitioner is, that it is a corporation; that none of its officers are now within this district.

FRANK H. DEAL.

Sworn to before me July 5, 1904.
[L. S.] MICHAEL F. O'CONNOR,
Notary Public, Rensselaer County, N. Y.

(Endorsed:)—Petition for Reissue and Assignment of Errors.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

In the United States District Court, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

Now comes Charles H. Green, by H. D. Bailey, his attorney and solicitor, and says, that the order made in this matter, entered July 28, 1904, reversing the decision of the Referee and allowing the filing of the claims of J. B. Orcutt Company, Charles Dauchy Company and Charles Duncan, is erroneous in matter of law and
19 against the rights of said Green and of other creditors, for the following reasons:

1st. These claims not having been presented to and filed with the Referee within one year after adjudication, their subsequent presentation and filing with the Referee is barred and forbidden by the provisions of Sec. 57*n* of the Bankruptcy Act.

2d. To the first question certified by the Referee the answer should have been "yes" and not "no."

3d. To the second question certified by the Referee the answer should have been "no" and not "yes."

4th. To the third question certified by the Referee the answer should have been "no" and not "yes."

5th. The claims should not be allowed to be filed, inasmuch as more than one year had elapsed since the adjudication, and there

was neither power nor discretion in the Court to allow the filing, and General Order 21 (1) imposes no duty upon the trustee.

Wherefore, the said Green prays that the order entered June 28, 1904, in so far as the same reverses the decision of the Referee, and in so far as it allows the claims above mentioned to be filed, may be revised, reversed, vacated and set aside, and that the Court may be directed to enter a decree accordingly.

H. D. BAILEY,
Attorney for Charles H. Green, Nos. 1 and 2
Keenan Building, Troy, N. Y.

(Endorsed:)—Assignment of Errors.—Filed July 6, 1904.—W. S. Doolittle, Clerk.

20 In the United States District Court, Northern District of New York.

In the Matter of INGALLS BROTHERS, Bankrupts.

In Bankruptcy. No. 1249.

Stipulated, that the foregoing papers, to wit:

1. Findings of fact and conclusions of law by Referee;
2. Order made by Referee, April 22, 1904;
3. Petition for review by claimants, printing waived;
4. Certificate of Referee, dated May 2, 1904;
5. Memorandum decision of Judge Hazel;
6. Order made by Judge Hazel June 27, 1904, entered June 28, 1904;
7. Notice of appeal and citation thereon;
8. Petition for review by Green, request upon trustee and his reply and order thereon;
9. Petition for review by Fullerton-Powell Hardwood Lumber Co.;
10. Assignment of errors,

shall constitute the record herein in the Circuit Court of Appeals. That the foregoing are correct transcripts of the whole of said originals, and that the questions of law to be passed upon are those certified by the Referee, and those determined in the order of
21 Judge Hazel. Clerk's certificate is dispensed with. Service of papers and citation waived.

Dated July 6, 1904.

WILLIAM W. MORRILL,
Att'y for J. B. Orcutt Co. and Charles Duncan, Appellees.
THOS. O'CONNOR,
Att'y for Charles H. Dauchy Co., Appellee.
HENRY W. SMITH,
Att'y for Trustee, Appellee.
FRANK H. DEAL,
Att'y for Fullerton-Powell Hardwood Lumber Co., Appellant.
H. D. BAILEY,
Att'y for C. H. Green, Appellant.

(Endorsed:)—Stipulation.—Filed July 26th, 1904.—W. S. Doolittle, Clerk.

(Endorsed:)—United States Circuit Court of Appeals for the Second Circuit.—In the Matter of Ingalls Brothers, Bankrupts.—Papers on Review of Order allowing Claims to be filed *nunc pro tunc*.—H. D. Bailey, Nos. 1 & 2 Keenan Building, Troy, N. Y.; Frank H. Deal, 249 River Street, Troy, N. Y., Attorneys for Appellants.

UNITED STATES OF AMERICA, *Northern District of New York, ss:*

I, William S. Doolittle, Clerk of the District Court of the United States of America for the Northern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 19, inclusive, contain true and complete copies of the following papers on file in my said office in the matter of Ingalls Brothers, Bankrupts, and stipulated to contain the papers to
22 review the order of said Court directing the Referee to file claims, to wit: Findings and decision of Referee refusing to allow the filing of claims *nunc pro tunc*, order of Referee denying application of J. B. Orcutt Company *et al.*, certificate of Referee for review, Memo., Hazel, *J.*, order allowing proofs of claims to be filed, petition for appeal, citation (original), requests of trustee to appeal and his refusal, petition of Charles H. Green for revision, order for revision, petition of Fullerton-Powell Hardwood Lumber Company for revision and assignment of errors, assignment of errors of Charles H. Green, and stipulation as to transcript of record.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Utica, in the Northern District of New York, in the Second Circuit, this twenty-ninth day of July, in the year of our Lord, one thousand nine hundred and four, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] W. S. DOOLITTLE, *Clerk*,
By C. W. HIGGISON, *Deputy*.

23 United States Circuit Court of Appeals for the Second Circuit.

No. 121. October Term, 1904.

Submitted January 19, 1905; Decided March 1, 1905.

In the Matter of INGALLS BROTHERS, Bankrupts; CHARLES H. GREEN ET AL., Appellants.

Appeal from the District Court of the United States for the Northern District of New York.

Before Judges Wallace, Lacombe, and Coxe.

This cause comes here upon appeal from an order of the District Court, Northern District of New York, providing that the claims of

three creditors of the bankrupt, one of whom is also the trustee, be received and filed by the Referee—although they had not been presented to him within one year after adjudication.

Per Curiam.—The referee rejected the claims, but the District Judge reversed his ruling, evidently in order to conform the practice in the Northern District to that followed in the Southern District *in re Seff* (unreported). The opinion of the referee sets forth the facts and contains a very full discussion of the questions of law involved and we concur in his interpretation of the statute and in his conclusions. His opinion is not reported, but it may be printed as a supplement to this memorandum.

The order of the District Court is reversed.

Submitted without argument.

24 In the District Court of the United States for the Northern District of New York.

In the Matter of WILBUR S. INGALLS and HOWARD R. INGALLS, as Individuals and as Co-partners of the Firm of Ingalls Brothers, Bankrupts.

In Bankruptcy. No. 1249.

Applications for Leave to File Proofs of Claim.

William W. Morrill, for J. B. Orcutt Company and Charles Duncan.

Thomas O'Connor, for C. H. Dauchy Company.

H. W Smith, for Trustee

H. D. Bailey, Frank H. Deal, for objecting creditors.

KING, Referee:—Three alleged creditors herein have filed petitions asking leave to file proofs of claims not filed within a year after adjudication. Within that year J. B. Orcutt Company verified a proof for $893.68; C. H. Dauchy Company, a proof for $3,535.67; Charles Duncan, a proof for $3,844. The Orcutt and Dauchy proofs were duly received by said Duncan, who is the trustee herein, for the purpose of being filed with the referee, and, together with his personal proof, were handed to his official attorney with instructions to file all three proofs. The attorney instructed his clerk to file them, but the clerk neglected to do so. Certain creditors have objected to their being now filed.

25 The question for determination is whether, as matter either of right or of discretion, these proofs can now be filed. The earnestness and ability of counsel have left little to be said, and no attempt will be made to follow out all the various lines of argument suggested; but it seems desirable to indicate something of the considerations involved in the decision reached.

The petitioners assert two things, viz.:

(1.) That neither Section 57*n* nor any other provision of the bankrupt act limits the filing of a proof of claim to a year or any particular time after adjudication; and

(2.) That if this be be not true, then the last sentence of G. O. XXI (1) operates to confer jurisdiction, under the circumstances of this case, to permit filing after the expiration of a year *nunc pro tunc* as of a date within the year.

Briefly stated, the argument for the first proposition is that Section 57*a* defines a proof of claim as "a statement under oath, in writing, signed by a creditor, setting forth the claim," etc.; that subs. *e* provides that "Claims after being proved may, for the purpose of allowance, be filed by the claimants—before the referee;" that subs. *d* provides that "Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court (referee)," etc.; that subs. *n* provides that "Claims shall not be proved against a bankrupt estate subsequent to one year after adjudication," that a "proof" is a claim "proved;" that the word "proved" must be assumed to have been employed in but a single sense and with a single meaning in the same section, and was not designated and cannot be construed to have in subs. *n* any larger meaning than in *a*, *e* or *d*, in short, that no logical or necessary construction of subs. *n* imposes any limitation upon the time of filing, but the contrary; and, finally, applying the section to the facts of this case, that the three claims in issue, having been "proved" within the year, may be filed at any time.

26 As a matter of first impression, the construction urged seems almost conclusively reasonable. Pursued further, however, the proposition is perhaps reduced to the absurd, when it is seen that the prohibition against "proving" in its literal effect would not prohibit—would simply forbid an act which *per se* would be not only utterly harmless but utterly foolish, unless logically related to some further act designated to render it effective. If "proved" in subs. *n* is the mere equivalent of "proof" in subs. *a* and "proved" in subs. *e* and *d*, there seems to be nothing better than some purely speculative reason for subs. *n*, since practically the time of verification can make no possible difference to parties in interest except as involved in the time of filing. "Proof" under subs. *a* involves nobody save the creditor himself; filing—"proved"—under subs. *n* involves notice to all parties in interest. That the presumably logical and consistent use of language is opposed by the practically illogical and inconsistent consequences involved seems to have been the decision or assumption of every court before which the interpretation of subs. *n* has arisen, although most of the decisions are somewhat general, rather than specific, and none of them specifically appears to have been predicated upon the precise state of facts disclosed here, *i. e.*, upon proofs verified within the year but offered for filing thereafter, which squarely raises the question of construction. However, their purpose cannot be doubted, and, being unbroken in point of their conclusion, they

must be accepted as conclusive against the petitioners. Stated in the order in which they are reported, they are:

Re Stein (1 Am. B. R. 662).
Bray *v.* Cobb (3 *id.* 788).
Re Shaffer (4 *id.* 728).
Re Rhodes (*id.* 197).
Re Liebowitz (6 *ib.* 268).
Hutchinson *v.* Otis (8 *id.* 382; s. c. on appeal, 10 *id.* 135).
Re Towne (8 *id.* 284).
Re Moebius (8 *id.* 590).
27 *Re* Bimberg (9 *id.* 601).
Re Prindle Pump Co. (10 *id.* 405).
Re Thompson's Sons (10 *id.* 581).
Re Brown (10 *id.* 588).
Re Long (11 *id.* 136).

See also, *in re* Stover (11 *id.* 345). The conclusion that subs. *n* relates to filing is categorically stated in Collier 4th ed. 394.

I hold that no statutory right to file a proof of claim subsequent to the expiration of a year after adjudication exists.

This leads to the second proposition at issue, which is most strenuously urged.

Irrespective of statutory powers, courts always possess the inherent power to be just in their direct dealings with persons subject to their jurisdiction and orders, and in case of fraud (*Re* Wolff, 4 Am. B. R. 74; *Re* Towne, *supra*). It is unnecessary to pursue the refinements of this subject; it is necessary to admit that the arguments advanced in support of the issue appeal very strongly to the sense of justice The issue itself presents a radical problem, turning upon the effect attributable to the final sentence of General Order XXI (1).

The bankruptcy act, Section 30, provides: "All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Pursuant thereto, that court prescribed G. O. XXI (1), which, by its final sentence, provides: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred." The act, Section 47, prescribes, and G. O. XVII relates to, duties of trustees, but no such duty is among them. The subject of proofs of claim is covered by Section 57.

The act of 1867, Section 10, provided: "That the justices of the Supreme Court, subject to the provisions of this act, shall frame general orders for the following purposes: For regulating the
28 duties of the several officers of said courts." Section 22 provided: "If the proof is satisfactory to the register (referee)—it shall be delivered or sent by mail to the assignee (trustee) who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of the creditors who have proved their claims—which books shall be open to the inspection of all the creditors." To regulate this duty G. O. XXXIV provided: "Proofs of

debt received by any assignee shall be delivered to the register to whom the case is referred." Thus it appears that this general order was strictly within Section 10 operating upon Section 22.

Under the act of 1898, G. O. XXXIV, just mentioned, became the basis of G. O. XXI, but so carelessly were the changes made that, although "trustee" replaced "assignee" and "referee" replaced "register," "claim" did not replace "debt," and apparently no comparison of the two acts and study of the old General Orders, sufficient to produce harmonious results, was made. The same criticism applies equally to various other General Orders.

The point sought to be emphasized is the necessary connection between the act of 1867 and its provisions just considered contained in G. O. XXXIV as contrasted with the entire lack of connection between the act of 1898 and its similar provisions in G. O. XXI (1), which has no reason to be.

Does Section 30 of the present act, already quoted, contemplate any enlargement of the rights or duties of any person prescribed by the act? Undeniably the General Orders are treated in practice as essential upon the subjects to which they relate. This very General Order XXI (1) is inevitably effective in its requirements preceding the sentence in question, as has been held whenever it was considered. It is claimed upon behalf of the trustee herein that the General Orders possess the force of law. That proposition, if conceded, would permit them to be inconsistent with the statute of which they are the creatures and to modify or enlarge it. Even though controlling, so far as not inconsistent with the act, certainly they must yield
29 to the act and cannot operate to prevent or alter its operation.

Perhaps unwilling recognition of this conclusion induces the further contention of the trustee that a decision of the question whether Section 57*n* limits the time within which proofs can be filed is unnecessary to the determination of the question whether, in view of the special sentence in General Order XXI (1), the court possesses power to permit the filing *nunc pro tunc* of the proofs in issue. This contention seems wholly untenable.

The authorities hereinbefore cited do or do not correctly declare the meaning of Section 57*n*. If they do correctly declare it, the Supreme Court is powerless to vary it. The Sentence of General Order XXI (1) in issue either does or does not impose a duty. If it does impose a duty, clearly the trustee is at fault and the remedy of the petitioners is upon his bond, which was given expressly to secure the faithful discharge of his duties, rather than in the favorable discretion of the court. If it does not impose a duty, equally clearly creditors cannot rely upon it, since they were not justified in depending upon mere volunteer action. It is urged that its existence is a perpetual snare and menace to creditors, and so puts the court in the position of doing injustice which good conscience requires it to rectify and which it has inherent power to rectify. Its existence is certainly unfortunate, and particularly to the petitioners, if their present plight be attributable to it. That, however, seems not to be at all the case, the proximate cause being mere carelessness, altogether not imputable to them. But to hold it a perpetual snare, in

the sense and with the effect claimed, would be to hold it *per se* a perpetual abrogation of Section 57*n*, entitling any tardy creditor at any time, and all tardy creditors at all times, to avoid the limitation, even to the point of fraud and injustice. Thus Section 57*n* is inevitably involved in any decision of the right to exercise discretion.

Discretion depends upon particular facts, not upon fixed general conditions. Compulsory discretion would be no discretion.

30 To recognize the mere existence of this obnoxious sentence as a sufficient basis for the exercise of discretion in the case at bar would be to compel the same action in every case and so to nullify Section 57*n*. In the case at bar, no particular facts appear to specialize it and so call for or justify the exercise of any discretion—such as a direct act of the court, which the court could readily see had produced damage. It was not misapprehension, but was carelessness, which produced the trouble. If Section 57*n* creates no limitation upon filing, no discretion need be invoked; if it creates the limitation declared by the authorities cited, no discretion can be exercised, even though invoked, merely in consequence of the existence of the obnoxious provision of G. O. XXI (1) or upon the facts of this case. Wait *v.* Van Allen (22 N. Y., 319); People *v.* Security Co. (79 N. Y., 267); McQuigan *v.* R. R. Co. (129 N. Y., 50, 55).

In reaching this conclusion, it has become logically necessary to disregard *In Re Seff*, the only decision urged as direct authority for the position of the petitioners. The papers therein have been treated as properly authenticated. Considerable might be said about them, but if the conclusions reached herein are correct, the Seff order is erroneous from whatever standpoint viewed, whether based upon the mere existence of the provisions of General Order XXI (1), or upon the exercise of discretion.

Careful consideration has been given to all the arguments submitted, but for the reasons stated I believe I am powerless to allow the proofs of claim in issue to be filed, and I so decide.

An order may be entered accordingly.

31 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 13th day of March, one thousand nine hundred and five.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of INGALLS BROTHERS, Bankrupts; CHARLES H. GREEN ET AL., Appellants.

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. J. W.
E. H. L.
A. C. C.

32 Endorsed: United States Circuit Court of Appeals, Second Circuit *In re* Ingalls Bros. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 13, 1905. William Parkin, Clerk.

33 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 32 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Ingalls Brothers, Bankrupts, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of June, in the year of our Lord One Thousand Nine Hundred and Five and of the Independence of the said United States the One Hundred and Twenty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

34 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Charles H. Green *et al.*, are appellants, and J. B. Orcutt Company, Charles Duncan *et al.*, are appellees In the Matter of Ingalls Brothers, Bankrupts, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of New York, and, we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States.

35 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceed-

ings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

36 [Endorsed:] File No. 19,902. Supreme Court of the United States. No. 400, October Term, 1905. J. B. Orcutt Company *et al. vs.* Charles H. Green *et al.* Writ of Certiorari.

37 In the United States Circuit Court of Appeals for the Second Circuit.

No. —.

CHARLES H. GREEN and the FULLERTON-POWELL HARD WOOD LUMBER COMPANY ET AL., Appellants,

vs.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, and CHARLES DUNCAN, Trustee in the Matter of Ingalls Bros., Bankrupts.

Whereas the petition of the respondents in the above entitled cause for the writ of certiorari to the Supreme Court of the United States was granted by the said Court on the twenty-fourth day of October, 1905, and whereas a certified copy of the transcript of the record in the above entitled cause accompanied the said petition and is now on file in that Court;

Now it is by counsel of the respective parties hereby stipulated and agreed that the certified transcript of the record in the above entitled cause now on file in the said Supreme Court shall be taken and considered as a return of the Clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari aforesaid.

H. D. BAILEY,
Counsel for Charles H. Green.
FRANK H. DEAL,
Counsel for Fullerton-Powell Hardware Lumber Co.
WILLIAM W. MORRILL,
Counsel for J. B. Orcutt Co. and Charles Duncan.
THOS. O'CONNOR,
Counsel for Charles H. Dauchy Co.
HENRY W. SMITH,
Counsel for Trustee.

38 (Endorsed:) *In re* Ingalls. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 31, 1905. William Parkin, Clerk.

39 To the Honorable the Supreme Court of the United States:

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as a return to the writ of certiorari issued herein.

Dated, New York, October 31st, 1905.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

40 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Ingalls Bros. Return to Writ of Certiorari.

[Endorsed:] File No. 19,902. Supreme Court U. S., October Term, 1905. Term No. 400. J. B. Orcutt & Co. *et al. vs.* Chas. H. Green *et al.* Writ of Certiorari and return. Filed Nov. 3rd, 1905.